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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JAY PRINTZ, SHERIFF/CORONER, RAVILLI COUNTY, MONTANA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

RICHARD MACK, SHERIFF, GRAHAM COUNTY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT.

	Page
Table of Authorities	iii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. *The Legislation*	3
II. *The Brady Act Is Not Structurally Offensive to the Tenth Amendment.*	6
III. *The Brady Act Will Not Blur Political Accountability of State Law Enforcement Officials.*	9
IV. *The Brady Act Does Not Unduly Burden State Law Enforcement Officers.*	10
V. *Conclusion*	13

TABLE OF AUTHORITIES

CASES **Page**

FERC v. Mississippi, 456 U.S. 742 (1982)..... 7

Frank v. United States, 78 F.3d 815 (2nd Cir., March 14, 1996)..... 6, 7, 8, 9, 10, 11, 12

Hodel v. Virginia Surface Mining and Reclamation Ass'n Inc., 452 U.S. 264 (1981)..... 5

Kentucky v. Dennison, 24 How. 66, 16 L. Ed. 717 (1861)..... 7

Koog v. United States, 79 F.3d 452 (5th Cir., March 21, 1996)..... 8

Mack v. United States, 66 F.3d 1025 (9th Cir. 1995), *cert. granted sub. nom. Printz v. United States*, 116 S.Ct. 2521 (June 17, 1996)..... 5, 6, 7, 8, 10, 11

New York v. United States, 505 U.S. 144 (1992).....5, 6, 7, 10

CONSTITUTIONAL PROVISIONS AND STATUTES

U. S. Const., Amend. X 5

Brady Handgun Violence Prevention Act, 18 U.S.C. §922 *et seq.*, ... *passim*

Gun Control Act of 1968, 18 U.S.C. § 921 *et seq* 3

OTHER AUTHORITIES

Firearm Facts, Center to Prevent Handgun Violence, April 1996..... 2

48 *The Record of the Association of the Bar of the City of New York*, p. 993 (December 1993)..... 2

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INTEREST OF *AMICUS CURIAE*

The Association of the Bar of the City of New York ("the Association") is a professional association of more than 20,000 attorneys. Since its inception, the Association has worked to promote legal reform to enhance the quality of life

and the rule of law in the Nation generally, and in particular in the Nation's cities. Indeed, the Association was founded in 1870 to address the corruption and lawlessness that pervaded New York City at that time and deprived its citizens of the liberty and security that the rule of law exists to ensure. The challenges facing urban America have changed somewhat since that time, but the Association's mission has not.

Today, few dangers imperil the security of life and the rule of law in urban America more than its horrific levels of gun-related violence. Statistics abound to demonstrate the severity of this national crisis, but reference to just one suffices to make the point: according to figures assembled by the Center to Prevent Handgun Violence from foreign and FBI reports, in 1992, the year prior to the enactment of the Brady Act, "handguns were used to murder 36 people in Sweden, 97 in Switzerland, 60 in Japan, 128 in Canada, 33 in Great Britain, 13 in Australia and 13,495 in the United States." *See* Center to Prevent Handgun Violence, "Firearm Facts", April 1996.

It was this threat that moved Congress to enact the Brady Handgun Violence Prevention Act, 18 U.S.C. § 922 *et seq.*, ("the Brady Act"). The Association has followed the history of this legislation with keen interest for several years and has previously defended it from the arguments of opponents of gun control that the legislation violated the Second Amendment.[1] With the consent of both petitioners and respondent, the Association now respectfully urges this Court, as *amicus curiae*, to reject the contention that this critical piece of national gun control legislation offends the Tenth Amendment.

SUMMARY OF ARGUMENT

Petitioners effectively ask this Court to resurrect the archaic notion that the federal government may never impose any obligation on state officials, no matter how temporary or ministerial or how compelling the national crisis that prompts

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[1] *See* 48 *The Record of the Association of the Bar of the City of New York*, p. 993 (December 1993).

the federal action may be. Any construction of the Tenth Amendment that so radically restrains the power of the federal government to enlist the temporary aid of state officers in addressing a dire national problem would disserve both the health and safety of the Nation and the interests of modern federalism.

Moreover, the Brady Act does not offend the sovereignty of the states because it does not commandeer their legislative processes. Rather, it temporarily requires state officers to make a "reasonable" search through "available" records to determine whether there is anything in a prospective gun purchaser's background that would disqualify that individual from receiving the weapon under federally established standards. The interim background check provisions of the Brady Act neither require state officers to establish substantive standards nor to regulate or administer commerce in weapons in any discretionary manner. The duties imposed on state officers are minimal, ministerial and temporary and pose no serious threat either of blurring lines of political accountability between state and federal officials or of impermissibly burdening the states with added obligations. The Brady Act is an expression of the Nation's desire that the federal and state sovereigns cooperate to stem the devastating tide of gun violence that currently besets it. The Association urges the Court to uphold it.

ARGUMENT

I. The Legislation

The Brady Handgun Violence Prevention Act amends title I of the Gun Control Act of 1968, 18 U.S.C. § 921 *et seq.*. The Act makes it unlawful for a firearms dealer to transfer guns to certain categories of people.[2] The Act requires that,

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[2] Specifically, the Brady Act makes it unlawful for a dealer to transfer firearms to a person who: is under indictment for or has been convicted of a crime punishable by one year or more in prison; is a fugitive from justice; is addicted to or is an unlawful user of certain controlled substances; is an adjudicated mental defective or committed to a mental institution; is

(Footnote continued)

within five years of the effective date of the Act (*i.e.*, by November 1998), the Department of Justice develop a national criminal background check system to permit instantaneous determination as to whether anything in a prospective purchaser's history would render the sale unlawful. § 922(t).

In the interim, the Act requires a five-day waiting period during which background checks are to take place. § 922(s)(2). This provision does not apply in states that require pre-purchase background checks, § 922(s)(1)(D), or permits and pre-permit background checks, § 922(s)(1)(c). To effectuate the background check, gun dealers are required to obtain statements from prospective purchasers, on forms prepared by the Bureau of Alcohol, Tobacco and Firearms, and to forward those statements to the Chief Law Enforcement Officer ("CLEO") of the of the prospective purchaser's place of residence. § 922(s)(1)(A)(i).

The Act further requires that a CLEO "to whom a transferor has provided notice . . . shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and a national system designated by the Attorney General." § 922(s)(2). If the CLEO does not find that the sale would violate the law, he or she must destroy any information provided by the statement within 20 days. § 922(s)(6)(B)(i). If the CLEO determines that the sale would violate the law, the rejected purchaser may demand that the CLEO provide in writing the reasons for the rejection within 20 days of receiving a request for such an explanation. § 922(s)(6)(c). It is these "interim background check provisions" that petitioners assail as violative of the Tenth Amendment.

The debate over the interim background check provisions is part of the larger, perennial debate on the interplay between

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an illegal alien; has been dishonorably discharged from the military; has renounced United States citizenship; or is subject to certain classes of restraining or protective orders. *See* 18 U.S.C. § 922(g).

the power of Congress to regulate interstate commerce and the powers reserved to the states under the Tenth Amendment. The Association's analysis begins with the assumption that, given the fact that the Brady Act directly regulates commerce in firearms, and given the considerable impact that firearm related crime has on interstate commerce, the Brady Act is manifestly a legitimate exercise of Congressional authority under the Commerce clause. *See Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995), *cert. granted sub. nom. Printz v. United States*, 116 S.Ct. 2521 (June 17, 1996).

Petitioners contend that the Tenth Amendment constrains Congressional authority to require state officers to engage in the interim background checks[3], principally invoking the Court's treatment of the Tenth Amendment in *New York v. United States*, 505 U.S. 144 (1992). There, the Court considered the Low-Level Radioactive Waste Policy Amendments Act of 1985, which sought to encourage the states to assume responsibility for low level radioactive wastes. Along with monetary and access incentives, which the Court found constitutionally unobjectionable, the legislation also featured a "take-title" provision by which states were required either to adopt a waste disposal regime consistent with certain congressionally mandated standards or take title to private waste disposal sites within their borders. Writing for the Court, Justice O'Connor held that "Congress may not simply 'commandee[r] the legislative processes of the States' by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 161 quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n. Inc.*, 452 U.S. 264, 288 (1982). The Court ruled that either of the options forced upon the states by the "take title" provisions -- adopting federally mandated standards or taking title to private waste sites -- "would 'commandeer' state governments into the service of federal regulatory purposes and for this reason would be inconsistent

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[3] The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People." U.S. Const., Amend. X.

with the Constitution's division of authority between federal and state governments." *Id.*

Taking their lead from the foregoing language in *New York*, the petitioners attack the interim background check provisions as unconstitutionally foisting obligations on state officers in the service of a federal regulatory program. As set forth more fully below, the Association believes that these concerns are appropriately answered by the opinions of the Ninth Circuit below, *Mack v. United States*, 66 F.3d 1025 and of the Second Circuit in *Frank v. United States*, 78 F.3d 815 (2nd Cir., March 14, 1996). We urge the Court to embrace the reasoning of these opinions.

II. The Brady Act Is Not Structurally Offensive to the Tenth Amendment.

The petitioners contend that the interim background check provisions undermine the sovereignty of the states. As stated by petitioner Mack, "[u]nder § 922(s), the officials of the State -- holding offices established, empowered, and funded by its people -- are no longer under the command of the State and its people." Mack Br. at 334. The Brady Act thus is said to run afoul of the Court's teaching that "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *New York*, 505 U.S. at 161, quoting *Hodel*, 452 U.S. at 288.

The duties imposed by the Brady Act on the CLEOs, however, are temporary and essentially ministerial. By arguing that the Tenth Amendment precludes even so minimal a federal obligation on state officers, petitioners effectively urge the Court to return the jurisprudence of the Tenth Amendment to the nineteenth century, when it was held that the federal sovereign might *never* compel *any* action by state officers -- a

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[4] Citations herein to the briefs of petitioners Printz and Mack take the forms "Printz Br. at __" and Mack Br.at ___," respectively.

position this Court properly rejected in *FERC v. Mississippi*, 456 U.S. 742, 761-62 (1982):

> ...the 19th century view, expressed in a well-known slavery case, was that Congress "has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it." *Kentucky v. Dennison*, 24 How. 66, 107, 16 L. Ed 717 (1861).
>
> Recent cases, however, demonstrate that this rigid and isolated statement... -- which suggests that the States and the Federal Government in all circumstances must be viewed as coequal sovereigns -- is not representative of the law today. While this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations..., there are instances where the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions.

(*citations omitted*); *see also Frank*, 78 F.2d at 827 ("*New York* did not purport to revert to the 19th-century rule that the federal government may never impose obligations on state officers"); *accord*, *Mack*, 66 F.3d at 1029. If the Court accepts petitioners' argument that the Tenth Amendment is offended by a federally required reasonable check through available records for a few years until the federal government itself can assume the full burden, it will deprive the federal sovereign of all power ever to compel any help from the states to address national problems.

The Court should also reject the contention of petitioners that the interim provisions, regardless of the degree of burden they actually impose, necessarily intrude upon what the Second Circuit has termed the "structural" role of the states in the system of federalism. *Frank*, 78 F.3d at 827. The Brady Act does not direct or coerce the states to enact legislation or to promulgate regulations, *cf. New York*. True, it does require the implementation of the interim background checks if the state does not enact its own background check or permit system.

However, unlike the onerous and coercive option Congress presented to the states in *New York*, the interim background provisions are modest measures which do not mandate, or even significantly encourage, the states to legislate or regulate at all. *See Frank*, 78 F.3d at 827; *see also Mack*, 66 F.3d at 1030 ("*New York* was concerned with a federal intrusion on the States of a different kind and much greater magnitude than any involved in the Brady Act. The constitutional evil . . . [was that] the federal government was attempting to direct the States to enact their own legislation or regulations according to a federal formula"). Instead, as the Second Circuit explained, "the Brady Act is an exercise of Congress's power to regulate individuals." *Frank*, 78 F.3d at 827. The Ninth Circuit, too, noted that the Act "does not embody a mandate to the 'States' in the sovereign sense . . . The Brady Act is a regulatory program aimed at individuals and not the States." *Mack*, 66 F.3d at 1031.

The Fifth Circuit has reasoned, however, that by drafting the interim provisions of the Brady Act to run to the CLEOs directly rather than to the state legislatures, "Congress engaged in a certain legislative legerdemain" with results that "are tantamount to forced state legislation" because they "effectively bypass the state legislative process and substantively change the enacted policies of state governments." *Koog v. United States*, 79 F.3d 452, 458 (5th Cir., March 21, 1996). Indeed, the Fifth Circuit implied that because they "bypass" the state legislative processes, the interim provisions are even more offensive to the Tenth Amendment than the "take title" provisions at issue in *New York*. *Id.* at 460. But the Fifth Circuit has misconstrued the nature of the state sovereignty *New York* sought to protect:

> Congress is, according to *New York*, barred under the Tenth Amendment from compelling state legislatures to enact legislation because the federal government may not commandeer the basic decisionmaking processes of state government. This view is reinforced by the Supreme Court's repeated reference to *Hodel*, which upheld provisions of the

> Surface Mining Control and Reclamation Act of 1977 because that statute did not compel the States to enact and enforce a federal regulatory program and thereby take over the States' legislative processes...The offending provision in *New York* -- because it required States to enact their own regulatory solution -- was the sort of unconstitutional legislation alluded to in *Hodel*.

Frank, 78 F.2d at 828 (*citations omitted*). Thus, requiring local officials to check available records is simply not, for constitutional purposes, the same thing as hijacking the statehouse.

In their zeal to depict the Brady Act as invasive of state sovereignty, petitioners overstate somewhat the contemplated role of the interim provisions. Mack argues that they will force him to serve as an "ajudicator" (Mack Br. at 25-26); petitioner Printz laments that the Brady Act "usurps the most fundamental element of state sovereignty: the administration of criminal justice." (Printz Br. at 28). In fact, the Brady Act does not require petitioners to determine the substantive standards by which a person may or may not receive a gun; those standards have already been set by Congress. The interim provisions simply require CLEOs to check some records for evidence of disqualifying facts in a prospective purchaser's background. This task is certainly ministerial -- indeed, it is little more than clerical and cloaks the CLEO with no greater substantive authority than the state has chosen to do.

III. The Brady Act Will Not Blur Political Accountability of State Law Enforcement Officials.

Petitioners also complain that performance of the interim background checks and related tasks will subject them to political backlash for the actions of Congress. The Tenth Amendment, to be sure, serves in part to protect against a blurring of the lines of political accountability between elected officials of the federal and state governments.

Petitioners' contentions that the interim provisions will undermine political accountability, however, lack merit.

In *New York* Justice O'Connor wrote that it "will be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." 505 U.S. at 169. That consideration is not present here. When the federal government requires the States to enact legislation the result is, obviously, *state* legislation. *Mack*, 66 F.3d at 1031. By contrast when "the federal government itself imposes a requirement on a state official, the requirement is more clearly an act of the federal government and thus does not, to the same extent, undermine political accountability." *Id.*

Indeed, in *Frank*, the Second Circuit not only rejected the contention that the Act would unconstitutionally subject state officials to adverse political consequences, but also suggested that the rule urged by the CLEOs would create a risk that

> federal officials could shift the blame for *inaction* by attributing persistent national problems, such as handgun violence, to the intransigence of local officials.... [or] the possibility that federal officials could consistently surrender responsibility for national problems by invoking abstract notions of "federalism" which would result in dissipation, as opposed to a mere shifting, of political responsibility.

78 F.3d at 828-29. Thus, considerations of political accountability which *New York* found in the Tenth Amendment support, rather than undercut, the constitutionality of the Brady Act.

IV. The Brady Act Does Not Unduly Burden State Law Enforcement Officers.

Apart from structural or political considerations, petitioners also object to the interim background check provisions on the ground that the duties they impose will prevent petitioners

from performing the rest of their job to such a degree as to violate the Tenth Amendment.

The Second and Ninth Circuits both considered whether the interim provisions violate the Tenth Amendment by imposing so great a burden on the state law enforcement apparatus that they effectively reduce the ability of the CLEOs to perform their state duties or enforce state law. The Ninth Circuit did acknowledge that "the federal government cannot stall the state government in its tracks by imposing all-consuming federal duties on the State's employees." *Mack*, 66 F.3d at 1032. However, nothing on the record before it caused the court below to believe that the Act was so burdensome, and the court suggested that a challenge based on such burdensomeness would not be ripe for resolution. The Ninth Circuit also held that the obligation on state officers in the Brady Act is no more burdensome than federally-imposed duties of state officers to report missing children or traffic fatalities. *Id.* at 1029-30.

The Second Circuit similarly concluded that the interim background check provisions were not impermissibly burdensome. That court invoked principles of statutory interpretation requiring it to avoid, whenever possible, interpretations of legislation which raise "serious constitutional problems". *Frank*, 78 F.3d at 830-31. Notwithstanding their complaints about the time required to perform and document background checks, the record does not show, and petitioners do not contend, that the interim provisions work so great a burden on them as to stall the sheriffs' offices in their tracks. If, someday, such a situation actually arose and the United States took the position that the interim provisions had to be complied with nonetheless, the affected CLEO would have a basis to attack the constitutionality of the statute as applied. But that is a question for another day; nothing on the face of the Brady Act foreshadows any such difficulty. Accordingly, the Court should not invalidate an otherwise constitutional statute on the basis of a hypothetical concern.

Additionally, as the Second Circuit pointed out in Frank, the Act "simply requires a 'reasonable effort' and directs that the background check include searching state and local records only if they are 'available'" and leaves it largely up to the CLEO in question as to what amounts to a "reasonable effort" under the circumstances. *Id.*

V. Conclusion

It is the legislatively expressed will of the people of the Nation, as the enactment of the Brady Act itself demonstrates, that inroads be made in the profusion of gun sales to potentially dangerous individuals and that the federal and state sovereigns cooperate, temporarily, in addressing that danger. Any interpretation of the Tenth Amendment that frustrates the will of the people in such matters would, in our judgment, disserve the interests of both the states and the Union in our system of modern federalism.

Respectfully submitted,

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